BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES H. KERR	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S.D. #365	)	
Respondent	)	Docket No. **1,055,159**
	)	
AND	)	
	)	
UNION INS. CO. OF PROVIDENCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 30, 2012 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on July 25, 2012.

APPEARANCES

Gary L. Jordan of Ottawa, Kansas, appeared for the claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the transcript of the September 20, 2011, preliminary hearing transcript is part of the evidentiary record.

ISSUES

While descending stairs in the course of employment, claimant tripped and fell on his knees on a concrete floor. The Administrative Law Judge (ALJ) found claimant sustained a 5 percent permanent partial impairment to the left knee and 20 percent permanent partial impairment to the right knee. Because claimant returned to his employment the ALJ further determined the presumption in favor of permanent total

disability was overcome.[1] Consequently, claimant was awarded compensation for two separate scheduled injuries.

Respondent requests review of the nature and extent of disability. Respondent argues the ALJ erred in not adopting the rating opinions of the authorized treating physician. Respondent further argues that the authorized treating physician was in the best position to determine claimant's permanent impairment. Respondent also argues that claimant has returned to full-duty work without restrictions.

Claimant requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of disability. Specifically, the nature and extent of claimant's K.S.A. 44-510d scheduled disabilities to his knees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed that on July 29, 2010, claimant had been asked by the school's superintendent, Mr. Don Blome, to give some law enforcement officers a tour around the school. As claimant was showing the officers the layout of every room in the building he was going down some stairs and missed the last step. He fell forward and landed on both knees on the concrete floor. The next day, claimant notified the secretary at the central office about his accident. Claimant sought medical treatment at his primary care physician's office.

Claimant's personal physician, Dr. MacKenzie Peterson, ordered x-rays of both knees and prescribed medication. Claimant's knee pain persisted and he was later referred to Dr. Jeffrey Salin, a board certified orthopedic surgeon, for further treatment.

Dr. Salin, examined claimant on September 1, 2010. Claimant had complaints of bilateral knee pain. Upon physical examination, Dr. Salin found claimant had bilateral medial joint tenderness, lateral joint tenderness, no pes anserine tenderness, patellofemoral crepitus, and stable valgus/varus. The doctor diagnosed claimant with an exacerbation of the medial compartment osteoarthritis as well as the patellar femoral joint

[1] See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, (2007).

(PFJ) osteoarthritis in both knees. At that time, Dr. Salin administered cortisone injections into both knees.

Claimant was ordered to have MRIs of both knees which occurred on September 22, 2010. The right knee MRI revealed a tear of the inferior articular surface of the posterior horn of the medial meniscus, chondromalacia of the articular cartilage of the medial tibiofemoral joint compartment and lateral tibial plateau, mild degenerative subchondral marrow edema of the medial tibial plateau, mild degenerative spurring of the medial tibiofemoral joint compartment, and mild subchondral marrow signal edema involving the posterior non weight bearing portion of the articular cartilage of the lateral femoral condyle. Ultimately, an arthroscopy was performed on the right knee on November 3, 2010, and the doctor diagnosed claimant as having a right medial meniscus tear as well as grade 4 chondromalacia. Claimant was required to go to physical therapy and work hardening.

The MRI of the left knee showed the patellar tendon was thickened with mild intrasubstance increased signal at its inferior pole attachment, mild soft tissue thickening along the lateral patellar retinaculum and degenerative-type changes. Claimant was prescribed pain medications, anti-inflammatories, physical therapy and injections. Dr. Salin opined that claimant's condition had improved with treatment. The doctor placed temporary restrictions on claimant of no prolonged walking, standing, bending, stooping or kneeling. On February 17, 2011, Dr. Salin released claimant to return to his normal work duties for both knees.

On March 22, 2011, claimant returned for a one time follow-up appointment with Dr. Salin. Claimant was tolerating his work duties but still had complaints of medial joint line tenderness and pain. The doctor released claimant at maximum medical improvement. On April 26, 2011, Dr. Salin rated claimant's right knee at 4 percent and his left knee at 3 percent based on the AMA *Guides*.[2]

On cross examination, the doctor testified:

> Q. Did Mr. Kerr have complaint of patella femoral pain upon your examination?
>
> A. Yes.
>
> Q. Right knee, left knee or both?
>
> A. Both knees.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Q. If you look at the second foot note under that Table 62, it says, in a patient with a history of direct trauma, and certainly this gentleman had history of direct trauma to his knees, didn't he?

A. Yes.

Q. Complaint of patella femoral pain, and that is also -- was also present here, correct?

A. Yes.

Q. And crepitation on physical examination, which he had also in this case, correct?

A. Correct.

Q. On both knees?

A. Yes.

Q. And even without joint space narrowing, he would be granted a five percent lower extremity impairment, would he not?

A. Correct.[3]

At the request of claimant's attorney, Dr. Edward Prostic, a board certified orthopedic surgeon, examined and evaluated the claimant on June 15, 2011. Dr. Prostic took a history from claimant and performed a physical examination. Claimant had poor development of the vastus medialis obliquus muscle bilaterally with prominence of the infrapatellar fat pads and significant anterior crepitus bilaterally. X-rays of both knees indicated that there was medial joint space narrowing bilaterally and more degeneration of the left patellofemoral joint than the right.

Based upon the AMA *Guides*, Dr. Prostic opined claimant has a 20 percent permanent partial impairment to his right lower extremity for 2 millimeters of joint space and a 5 percent permanent partial impairment to his left lower extremity for 15 degree loss of motion. The doctor opined that claimant will require total knee replacement arthroplasty to both knees.

Claimant testified that going up and down stairs causes pain in both of his knees. He is not able to kneel or squat like he used to before the accident. Drs. Salin and Prostic both told claimant that in the future he may need a total knee replacement for each knee. Claimant continues to take pain and anti-inflammatory medication for his knees.

[3] Salin Depo. at 18.

K.S.A. 44-510d(a)(23) provides that "[l]oss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein."

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[4] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[5]

Drs. Salin and Prostic both provided rating opinions pursuant to the AMA *Guides*. But Dr. Salin did not explain how he arrived at his ratings and on cross-examination agreed that claimant's findings would support higher ratings pursuant to the AMA *Guides*. Conversely, Dr. Prostic based his ratings on claimant's loss of range of motion on the left knee and loss of joint space on the right knee. The ALJ adopted Dr. Prostic's ratings as more persuasive because he had examined claimant's left knee for an injury before the instant accident and was able to compare those findings with claimant's current condition. And the ALJ determined that Dr. Prostic's ratings were better corroborated by exam findings and by reference to specific tables in the AMA *Guides*. The Board agrees and affirms.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[6] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 30, 2012, is affirmed.

IT IS SO ORDERED.

---

[4] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[5] *Graff v. Trans World Airlines,* 267 Kan. 854, 983 P.2d 258 (1999).

[6] K.S.A. 2010 Supp. 44-555c(k).

Dated this 31st day of July, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

e: Gary L. Jordan, Attorney for Claimant, gjordan@workinjuryhelp.net
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Ron@LaskowskiLaw.com
Brad E. Avery, Administrative Law Judge